

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOSEPH GALIPO; CAROL WADE; AND
ASHLEY GALIPO, Individually, and as
Administrator of the Estate of Joseph
Galipo,

Plaintiffs,

v.

CITY OF LAS VEGAS; CITY OF LAS
VEGAS POLICE DEPARTMENT;
STATE OF NEVADA; NEVADA
HIGHWAY PATROL; OFFICER
FARRINGTON; and OFFICER YANNIS,

Defendants.

2:06-CV-00895-PMP-RJJ

ORDER

Presently before the Court is Defendants Las Vegas Metropolitan Police Department, Officer Farrington and Officer Yannis' Motion for Summary Judgment (Doc. #14), filed on January 9, 2007. Plaintiffs Joseph Galipo, Carol Wade Galipo, and Ashley Galipo filed Plaintiffs' Opposition to Summary Judgment Motion and Request to Continue Hearing Pursuant to FRCP 56(f) (Doc. #17, #18) on February 12, 2007. Defendants filed a Reply (Doc. #19) on February 27, 2007.

I. BACKGROUND

On July 21, 2004, California Highway Patrol officers engaged in a high speed pursuit of Plaintiff Joseph Galipo ("Galipo") on Interstate 15. (Compl. at 3; Mot. for Summ. J. [Doc. #14], Aff. of Charles Yannis ["Yannis Aff."] at 2.) As the pursuit crossed from California into Nevada, Las Vegas Metropolitan Police Department ("LVMPD")

1 Officers Farrington and Yannis received a request for assistance in the pursuit. (Yannis
2 Aff. at 1-2.) California Highway Patrol informed Yannis and Farrington that Galipo was
3 driving recklessly at speeds exceeding 130 miles per hour. (Id. at 2.) In addition to
4 Farrington and Yannis' participation, a police helicopter was involved in the pursuit and
5 from its vantage it could be seen that Galipo was traveling at a high rate of speed without a
6 seatbelt and with the car's "T Tops" down. (Compl. at 3-4; Yannis Aff. at 2.) Galipo
7 exited the freeway at Jean, Nevada and turned north onto Las Vegas Boulevard. (Yannis
8 Aff. at 2.) The helicopter unit reported to Farrington and Yannis that Galipo was traveling
9 between 120 and 130 miles per hour. (Id. at 2.)

10 Farrington and Yannis placed spike sticks in the road ahead of Galipo,
11 approximately two miles from the intersection of St. Rose and Las Vegas Boulevard.
12 (Compl. at 4; Yannis Aff. at 2.) Officer Yannis avers he did so out of a concern Galipo
13 would cause an accident because he was traveling at such a high rate of speed and was
14 approaching a traffic signal controlled intersection at which the noon-time traffic normally
15 was heavy. (Yannis Aff. at 2.) Additionally, the helicopter unit reported to Yannis that
16 Galipo already had almost caused a head-on collision with another vehicle. (Id. at 3.)
17 Yannis avers he and Farrington pulled to the side of the road about two miles from this
18 intersection and turned on their vehicles' emergency lights. (Id.) Yannis states he and
19 Farrington placed tire spikes in the road in an area visible to oncoming traffic and with
20 adequate time for Galipo to see the spikes and stop. (Id.)

21 Galipo swerved in an attempt to avoid the tire spikes and/or the officers who
22 were in the road setting up the tire spikes. (Compl. at 4; Yannis Aff at 3.) Galipo lost
23 control of his car, the car rolled over, and he was ejected from the vehicle sustaining fatal
24 injuries. (Compl. at 4; Yannis Aff. at 3.)

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1 Plaintiffs brought suit in this Court against Defendants City of Las Vegas,¹ the
2 State of Nevada, Nevada Highway Patrol, Las Vegas Metropolitan Police Department
3 (“LVMPD”), and Officers Farrington and Yannis. Plaintiffs allege municipal liability for
4 the unconstitutional use of excessive force (count one), fourth amendment violations for the
5 use of excessive force (count two), civil rights conspiracy (count three), and fourteenth
6 amendment violations for intentional interference with the familial relationship (count
7 four).

8 Defendants LVMPD, Farrington, and Yannis move for summary judgment.
9 Defendants Farrington and Yannis argue no fourth amendment seizure occurred because
10 Galipo avoided the tire spikes and thus police action did not cause Galipo to stop.
11 Additionally, Defendants argue if a seizure did occur, their use of the tire spikes was a
12 reasonable use of force given the circumstances of Galipo’s reckless driving combined with
13 his proximity to a busy intersection. Alternatively, Farrington and Yannis argue that even if
14 a constitutional violation occurred, they are entitled to qualified immunity because such a
15 violation was not clearly established at the time Defendants acted. Defendants also argue
16 Plaintiffs’ civil conspiracy claim sets forth no facts supporting the claim and does not
17 explain what Defendants allegedly “covered up.”

18 Defendant LVMPD argues it cannot be liable for a custom or practice unless
19 Plaintiffs first establish a constitutional violation. Defendant LVMPD joins in Farrington
20 and Yannis’ arguments that no constitutional violation occurred and therefore there was
21 nothing for LVMPD to “cover up.” Additionally, Defendant LVMPD contends Plaintiffs
22 have failed to identify any other instances in which LVMPD exhibited a policy of refusing
23 to investigate or document instances of excessive force or failing to supervise or discipline
24 officers who use excessive force.

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26 ¹ Defendant City of Las Vegas has been dismissed from this action. (Order [Doc. #12].)

1 Plaintiffs respond there are factual disputes about whether Galipo's tires struck
2 the spikes and the timing and placement of the spikes in the road. For example, Plaintiffs
3 suggest the traffic report stated the officers were setting up the tire spikes seconds before
4 the crash and Galipo therefore did not have time to stop to avoid the spikes and/or the
5 officers still in the roadway. Plaintiffs argue the law regarding setting up dangerous or
6 deadly roadblocks was clearly established at the time of the incident. Plaintiffs argue the
7 motion is premature and request the opportunity to conduct further discovery, such as the
8 depositions of Farrington, Yannis, and the individuals who investigated the crash, before
9 the Court rules on summary judgment.

10 **II. LEGAL STANDARD**

11 Summary judgment is appropriate if "the pleadings, depositions, answers to
12 interrogatories, and admissions on file, together with the affidavits, if any" demonstrate
13 "there is no genuine issue as to any material fact and . . . the moving party is entitled to a
14 judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law defines which
15 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All
16 justifiable inferences must be viewed in the light most favorable to the non-moving party.
17 County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

18 The party moving for summary judgment bears the initial burden of showing the
19 absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212
20 F.3d 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond
21 the pleadings and set forth specific facts demonstrating there is a genuine issue for trial.
22 Id.; Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001).

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1 III. DISCUSSION

2 A. Counts 1 and 2 - 42 U.S.C. § 1983

3 In counts one and two of the Complaint, Plaintiffs allege Defendants Farrington,
 4 Yannis, and LVMPD violated Galipo's Fourth Amendment rights by unreasonably using
 5 deadly force against him.² Title 42 U.S.C. § 1983 provides that "[e]very person who, under
 6 color of [law], subjects, or causes to be subjected, any citizen of the United States . . . to the
 7 deprivation of any rights, privileges, or immunities secured by the Constitution and laws,
 8 shall be liable to the party injured in an action at law . . . or other proper proceeding for
 9 redress." Consequently, to establish liability under § 1983, a plaintiff must allege the
 10 violation of a right secured by the Constitution and laws of the United States, and must
 11 show that the alleged deprivation was committed by a person acting under color of state
 12 law. Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003). To establish municipal
 13 liability, the plaintiff must establish both a constitutional deprivation and the existence of a
 14 municipal custom or policy that caused the deprivation. Munger v. City of Glasgow Police
 15 Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000) (citing Monell v. Dep't of Soc. Servs., 436 U.S.
 16 658, 690-91 (1978)); Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000).

17 To allay the "risk that fear of personal monetary liability and harassing litigation
 18 will unduly inhibit officials in the discharge of their duties," government officials
 19 performing discretionary functions may be entitled to qualified immunity for claims made
 20 under § 1983. Anderson v. Creighton, 483 U.S. 635, 638 (1987). Qualified immunity
 21 protects "all but the plainly incompetent or those who knowingly violate the law." Malley
 22 v. Briggs, 475 U.S. 335, 341 (1986).

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 24 ² Plaintiff Ashley Galipo brings claims as Administrator of the decedent's estate. She therefore
 25 has standing to pursue the decedent's Fourth Amendment claims. See Moreland v. Las Vegas Metro.
 26 Police Dep't, 159 F.3d 365, 369 (9th Cir. 1998) (holding family members may bring decedent's § 1983
 claim for Fourth Amendment violations if state law permits survival actions); Nev. Rev. Stat.
 § 41.100(3) (permitting decedent's executor or administrator to maintain decedent's cause of action).

1 In ruling on a qualified immunity defense, a court first must consider whether the
2 facts alleged show the defendants' conduct violated a constitutional right. Sorrels v.
3 McKee, 290 F.3d 965, 969 (9th Cir. 2002). In making this determination, the court views
4 the facts alleged in the light most favorable to the party asserting the injury. Id. If the
5 plaintiff has alleged a deprivation of a constitutional right, the court then must determine
6 whether that right was clearly established. Id. A right is clearly established if "'it would be
7 clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Wilkins v. City of Oakland, 350 F.3d 949, 954 (9th Cir. 2003) (emphasis omitted) (quoting
8 Saucier v. Katz, 533 U.S. 194, 202 (2001)). The court should make this second inquiry "in
9 light of the specific context of the case, not as a broad general proposition." Saucier, 533
10 U.S. at 200. The plaintiff bears the burden of showing that the right at issue was clearly
11 established. Sorrels, 290 F.3d at 969.

13 Courts analyze claims that law enforcement officers have used excessive force in
14 the course of an arrest under the Fourth Amendment to the United States Constitution.
15 Smith v. City of Hemet, 394 F.3d 689, 700 (9th Cir. 2005) (citing Graham v. Connor, 490
16 U.S. 386 (1989); Ward v. City of San Jose, 967 F.2d 280 (9th Cir.1992) (as amended)).
17 Determining whether an officer used excessive force involves balancing "the nature and
18 quality of the intrusion on the individual's Fourth Amendment interests against the
19 countervailing governmental interests at stake." Graham v. Connor, 490 U.S. 386, 396-97
20 (1989) (quotations omitted). This is a fact-intensive, case-by-case inquiry viewed from the
21 perspective of a reasonable officer on the scene which considers "the severity of the crime
22 at issue, whether the suspect poses an immediate threat to the safety of the officers or
23 others, and whether he is actively resisting arrest or attempting to evade arrest by flight."
24 Id. at 396. The reasonableness inquiry takes into account "the fact that police officers are
25 often forced to make split-second judgments-in circumstances that are tense, uncertain, and
26 rapidly evolving-about the amount of force that is necessary in a particular situation." Id. at

1 396-97. The reasonableness standard is objective and does not inquire into an officer's
2 intent or motive. Id. at 397.

3 The United States Supreme Court recently held in a similar case that “[a] police
4 officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of
5 innocent bystanders does not violate the Fourth Amendment, even when it places the
6 fleeing motorist at risk of serious injury or death.” Scott v. Harris, No. 05-1631, Slip. Op.
7 at 11, 550 U.S. ---- (2007). In Scott, Georgia police attempted to pull over Victor Harris
8 (“Harris”) for speeding. Id. at 1. Rather than comply, Harris fled at speeds exceeding 85
9 miles per hour down a two-lane road. Id. Officer Timothy Scott (“Scott”) joined the chase.
10 Id. Scott ultimately bumped his patrol car into the rear of Harris’ vehicle, causing Harris to
11 lose control and crash. Id. at 2. Harris suffered serious injuries which rendered him a
12 quadriplegic. Id.

13 Harris filed suit pursuant to 42 U.S.C. § 1983. Id. Scott moved for summary
14 judgment, asserting he was entitled to qualified immunity. Id. On appeal, the Supreme
15 Court ruled Scott’s conduct was objectively reasonable and therefore did not constitute a
16 Fourth Amendment violation even though he used potentially deadly force to end the high-
17 speed pursuit. Id. at 8-11. The Supreme Court noted that in balancing the various interests
18 at stake, it is appropriate to consider both the number of lives at stake and the “relative
19 culpability” of those individuals. Id. at 11. Harris placed himself and the public in danger
20 when he engaged in the reckless, high speed flight whereas members of the public whom he
21 endangered during that flight were innocent. Id. The Supreme Court specifically rejected
22 the notion that the police could protect the public by ceasing the pursuit because calling off
23 the chase does not ensure a fleeing suspect will cease driving recklessly and because it
24 creates “perverse incentives” for individuals to flee and drive recklessly to evade arrest. Id.
25 at 12-13. The Court therefore found no reasonable jury could have found Scott’s conduct
26 was objectively unreasonable and granted summary judgment in Scott’s favor. Id. at 13.

1 Plaintiffs do not dispute Galipo fled from police and was approaching a busy
2 intersection at a high rate of speed. However, Plaintiffs request the opportunity to conduct
3 discovery before the Court rules on the summary judgment motion pursuant to Federal Rule
4 of Civil Procedure 56(f).³ Plaintiffs contend issues of fact remain, such as whether the tire
5 spikes actually struck Galipo's tires and whether an officer still was in the roadway at the
6 time Galipo swerved. The Court will assume the tire spikes struck Galipo's tires such that
7 the officers "seized" Galipo for Fourth Amendment purposes. Additionally, the Court will
8 assume the officers set up the tire spikes only seconds before Galipo approached in such a
9 manner that Galipo could not stop in time and that an officer still was in the roadway when
10 Galipo swerved to avoid the spikes, the officer, or both.

11 Assuming these facts, no reasonable jury could find Officers Farrington and
12 Yannis' conduct was objectively unreasonable and thus no Fourth Amendment violation
13 occurred. Weighing the number of lives at stake as well as the relative culpability, the
14 officers' decision to subject Galipo to potentially deadly force to prevent him from
15 endangering innocent lives of members of the public at the upcoming intersection is
16 objectively reasonable as a matter of law. Plaintiffs contend that if the officers were going
17 to attempt to seize Galipo, such a seizure is unreasonable unless they gave him adequate
18 time see the tire spikes and stop before striking them. However, the Scott Court did not
19 require the officer to give the suspect an opportunity to appreciate the force about to be used
20 against him and to respond before the officer bumped his car. Galipo refused to stop and
21 was approaching a busy intersection at high speed, thus placing at risk innocent lives.
22 Plaintiffs do not contend further discovery would show Galipo was not driving recklessly or
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24 ³ Plaintiffs include the required Rule 56(f) declaration setting forth the need to conduct
25 discovery and identifying the requested discovery as the depositions of Officers Farrington and Yannis
26 as well as the officers who investigated the crash. The Court will disregard the proffered Rule 56(f)
affidavit of Dale Galipo, however, as he is neither a party nor an attorney in this matter.

1 that he was not endangering the public. Rather, Plaintiffs affirmatively pled Galipo was
2 driving at a high rate of speed and that the officers knew he was speeding when they
3 decided to put down the tire spikes.

4 The officers' attempt to stop Galipo's reckless, high-speed flight that threatened
5 the lives of innocent members of the public does not violate the Fourth Amendment, even
6 though they risked using deadly force against Galipo. Because the officers did not violate
7 Galipo's Fourth Amendment rights, they are entitled to qualified immunity. Additionally,
8 because no Fourth Amendment violation occurred, Defendant LVMPD is not liable under
9 § 1983 either. The Court therefore will grant Defendants' motion for summary judgment on
10 counts 1 and 2.

11 **B. Count 3 - 42 U.S.C. § 1985**

12 In count three of the Complaint, Plaintiffs allege Defendants Farrington and
13 Yannis conspired "to cover-up their acts of brutality and cover-up the true cause of the
14 decedent's catastrophic injuries and death." (Compl. at 11.) Defendants move to dismiss
15 this claim, arguing Plaintiffs' civil conspiracy claim sets forth no facts supporting the claim
16 and does not explain what Defendants allegedly "covered up." Defendants argue that
17 because they agree with Plaintiffs' statement of how the accident occurred, there is no basis
18 to allege a "cover up." Plaintiffs do not respond to this argument either substantively or in
19 their request for further discovery.

20 Pursuant to Local Rule 7.2(d), failure to file points and authorities in opposition
21 to a motion constitutes consent to granting the motion. Plaintiffs failed to respond to
22 Defendants' arguments regarding the civil conspiracy claim and thus they concede
23 Defendants are entitled to summary judgment on the claim. Further, the claim suffers from
24 two substantive defects. First, no constitutional violation occurred, and thus Defendants
25 could not have conspired to cover up their alleged violation of Galipo's Fourth Amendment
26 rights. Second, Defendants have agreed with Plaintiffs' allegations regarding how Galipo

died and the Complaint does not explain in what manner Defendants' version of events differ or what facts Defendants have attempted to conceal. Accordingly, the Court will grant Defendants' motion for summary judgment as to count three.

D. Count 4 - Fourteenth Amendment

In count four of the Complaint, Plaintiffs allege that by violating Galipo's Fourth Amendment rights, Defendants also violated Plaintiffs' Fourteenth Amendment rights by interfering in their familial relationship with Galipo. Defendants argue that because no constitutional violation occurred, they are entitled to summary judgment on this claim.

The parents and children of a person killed by law enforcement officers may assert a substantive due process claim under the Fourteenth Amendment based on the deprivation of their liberty interest arising out of their relationship with the decedent.⁴ See Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 371 (9th Cir. 1998). The plaintiff must allege more than mere negligence to support a due process claim, however. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). In the context of police pursuit of a fleeing suspect in a high speed chase, a plaintiff must establish the officer used excessive force with the intent to harm the suspect physically or to worsen his legal plight to establish § 1983 liability. County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998). If the officer's actions were objectively reasonable, "it follows that his conduct d[oes] not offend the more stringent standard applicable to substantive due process claims." Moreland, 159 F.3d at 371 n.4.

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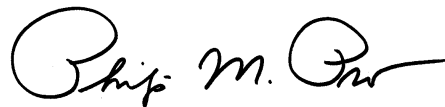
⁴ The Complaint alleges Ashley Galipo is the decedent's daughter and Joseph Galipo's declaration identifies him as the decedent's father. (Compl. at 2; Pls.' Opp'n, Decl. of Joseph Galipo.) Accordingly, they have standing to assert this claim. The Complaint does not allege the relationship between Plaintiff Carol Wade and the decedent.

1 Because Defendants' conduct was objectively reasonable, Defendants also are
2 entitled to summary judgment on Plaintiffs' Fourteenth Amendment substantive due process
3 claims. The Court therefore will grant Defendants' motion for summary judgment on count
4 four.

5 **IV. CONCLUSION**

6 IT IS THEREFORE ORDERED that Defendants Las Vegas Metropolitan Police
7 Department, Officer Farrington and Officer Yannis' Motion for Summary Judgment (Doc.
8 #14) is hereby GRANTED. Plaintiffs' Complaint is hereby dismissed with prejudice as to
9 Defendants Farrington, Yannis and LVMPD.

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11 DATED: May 8, 2007.

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14 PHILIP M. PRO
15 United States District Judge
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